

This letter discusses nexus. See Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992). (This is a GIL.)

April 13, 2006

Dear Xxxxx:

This letter is in response to your letter dated April 22, 2005, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

This letter is being written on behalf of my client to determine whether there is any instance of tax to which their business activity would be associated. I have reviewed the pertinent statutes and regulations and researched prior opinion or letter rulings and have found no circumstance similar to the activities of the client. I have also concluded that the level of activity within your state is insufficient to create a taxable presence. This request is being submitted to confirm our position or to inform us if there is something that may have been overlooked in the research. The client's activities are as follows:

CLIENT is a privately held wholesale data mobile access provider of airtime services to telematics, telemetry and machine-to-machine markets. CLIENT wholesales mobile airtime acquired from an offshore carrier, in the United States, through its offshore Network Operations Center ("NOC"). CLIENT's services are available both to customers in the U.S. and the market of its offshore carrier. The customers of CLIENT overwhelmingly resell CLIENT's airtime services, the ultimate consumers and, occasionally, a few customers use CLIENT's airtime services for internal applications within their business.

CLIENT purchases airtime and resells with value added services and has no tangible personal property located in Illinois. CLIENT sells its services through its offshore executive team, and by partner referrals. It has no sales personnel within your jurisdiction.

The following questions are being directed to your attention:

SALES TAX

CLIENT has no apparent taxable presence within Illinois. CLIENT has no tangible personal property located in the state and conducts no sales activities within the state. Does the presence of a resale customer create a taxable presence within Illinois?

If a taxable presence were determined, what receipts would be subject to tax?

INCOME TAX

CLIENT has no apparent taxable presence within Illinois. CLIENT has no tangible personal property located in the state and conducts no sales activities within the state. Does the presence of a customer create a taxable presence within Illinois?

Since all receipts would be paid to a foreign jurisdiction, what receipts would be subject to tax in Illinois?

BUSINESS PRIVILEGE TAX

CLIENT has no apparent taxable presence within Illinois. CLIENT has no tangible personal property located in the state and conducts no sales activities within the State. Does the presence of a resale customer create a taxable presence within Illinois?

If a taxable presence were determined, what receipts would be subject to tax?

TELECOMMUNICATIONS TAX

Are there any telecommunications taxes that CLIENT would be subject to? If so, how are these taxes determined? From the CLIENT'S perspective, voice or data transmissions do not originate or terminate within Illinois. Are these taxes collected by CLIENT or by the resale customer of CLIENT?

After your review of the facts and a determination has been made, you may direct your response to:

ADDRESS

Should you have additional questions, you may contact me via e-mail or by phone.

DEPARTMENT'S RESPONSE:

This letter only addresses the sales tax and telecommunication tax issues referred to in your letter. Issues regarding Income taxation has been referred to the appropriate division and will be addressed by the Income Tax Division under a separate letter.

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a seller would be considered "an Illinois retailer" subject to Retailers' Occupation Tax liability or "a retailer maintaining a place of business in Illinois" subject to Use Tax collection duties from their Illinois customers.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State.

For information regarding any telecommunications excise tax which may apply, please refer to the Department's regulations found at 86 Ill. Adm. Code 495.100 through 495.140. Information regarding telecommunications taxes collected by a retailer maintaining a place of business in this State may be found at 86 Ill. Adm. Code 495.140(b). In addition, information regarding sales for resale of telecommunications may be found in general information letter ST 04-0241-GIL, which may be found on the Department's internet website under the heading of "Legal Research."

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

EEB:msk